Supreme Court, U.S.
FILED
MAY 18 2005
OFFICE OF THE CLERK

(3)

No. 04-992

# In the Supreme Court of the United States

D.T.B., a minor child, by his next friend, DANIEL J. O'CALLAGHAN, and DANIEL J. O'CALLAGHAN, *Pro Se*, on his own behalf,

Petitioners,

v.

HON. JOHN J. FARMER, JR., in past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER, in his past or present official capacity, as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY; and DAVID F. SALVAGGIO,

Respondents.

**On Petition For a Writ of Certiorari To The United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for State Respondents
R.J. Hughes Justice Complex
P.O. BOX 112
Trenton, New Jersey 08625
(973) 648-4730

NANCY KAPLEN
Assistant Attorney General

ANDREA M. SILKOWITZ
Assistant Attorney General,
(Counsel of Record)

## QUESTIONS PRESENTED

Whether the court of appeals properly applied the Rooker-Feldman doctrine in affirming the dismissal of this action for declaratory and injunctive relief as to the State respondents whereby petitioners sought to have the federal district court overturn, as constitutionally invalid, final orders issued by respondent Judge Harper?

Whether subject matter jurisdiction is lacking as to the claims for retrospective declaratory and injunctive relief asserted against the State respondents by reason of Eleventh Amendment immunity?

Whether the declaratory and injunctive relief sought as to the State respondents in this action has been rendered moot by the intervening State appellate court ruling?

Whether certiorari should be denied as dismissal of the amended complaint for declaratory and injunctive relief filed against the State respondents would have been warranted pursuant to the Younger v. Harris abstention argument advanced before the federal district court?

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## COUNTERSTATEMENT OF THE CASE

This petition for a writ of certiorari arises from a September 14, 2004, decision by the United States Court of Appeals for the Third Circuit affirming the District Court of New Jersey's dismissal of an amended complaint of petitioner Daniel J. O'Callaghan, individually and on behalf of his son, D.T.B., a minor, seeking declaratory and injunctive relief against former New Jersey Attorney General John J. Farmer, Jr. and Superior Court of New Jersey, Chancery Division-Family Part Judge John J. Harper on the basis of the Rooker - Feldman doctrine. As determined by the lower federal courts, petitioners' federal constitutional challenge to visitation and other rulings rendered by Judge Harper as to D.T.B. and other claims inextricably tied to these challenges were not cognizable by the federal district court but rather were appropriate for state appellate review then pending.

Mr. O'Callaghan is the natural father of twelve-year-old D.T.B. (A139).[1] On June 22, 2000, Mr. O'Callaghan, then residing in Brooklyn, New York, filed suit against V.J.B., the natural mother of D.T.B., a resident of Chester, New Jersey, in the Superior Court of New Jersey, Chancery Division-Family Part, Morris County, seeking an adjudication establishing his paternity of D.T.B. and reasonable visitation with the child, pursuant to N.J.S.A. 9:17-39,40 (Appendix K to the Petition for Certiorari) (hereinafter, App. K). On June 23, 2000, Mr. O'Callaghan's then counsel filed a motion seeking, inter alia, temporary custody of D.T.B. or, in the alternative, a liberal parenting-time schedule with him (A117). Following a hearing conducted by Judge Harper on July 28, 2000, the court issued an order, inter alia, continuing custody of D.T.B. with his mother, requiring that the parties undergo a best interest investigation and home inspection with

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[1] A __ refers to the appendix filed by Mr. O'Callaghan with the United States Court of Appeals for the Third Circuit.

which they were to "fully cooperate" and directing that D.T.B. be interviewed by the court on August 10 in connection with the best interest investigation (A121; A122). On or about August 15, 2000, Mr. O'Callaghan filed a substitution of attorney, noting his appearance pro se (A123), and on August 18, 2000, sought emergent relief, alleging Ms. B.'s refusal to provide him with agreed upon parenting time (A124 to A147).[2] Pending consideration of the applications by Judge Harper, Judge Christine L. Miniman entered an order on August 18, 2000, directing that Mr. O'Callaghan be afforded overnight, continuous parenting time with D.T.B. between August 18 and 22, 2000 (A156 to A158).

Following hearings on August 22 and 25, 2000, and relying on submissions by D.T.B.'s mother, Judge Harper entered an order which suspended all overnight visitation between Mr. O'Callaghan and his son (A159 to A161; A168 to A170) but directed that visitation occur following the court proceeding and thereafter, during the day on August 26, 2000, from 10:00 a.m. to 6:00 p.m. at Mr. O'Callaghan's home and on August 29, 2000, from 3:00 p.m. to 7:00 p.m. in New York City (A179 to A181). Additionally, the court appointed Ann T. Scucci as guardian ad litem to interview the parties and child and make recommendations to the court and Dr. Mathias R. Hagovsky, a psychologist, to provide therapy to D.T.B., with the parents participating in the therapy. The court continued the matter until September 15, 2000 (A181).

Mr. O'Callaghan thereafter sought an emergent stay of the order appointing a guardian ad litem and therapist and restoration of his overnight parenting time (A182 to A196;

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[2] According to a certification filed by Mr. O'Callaghan, his then counsel had advised him that Judge Harper had authorized D.T.B.'s overnight visit with his father for the weekend of August 12 and 13 (A124). As Judge Harper would later note in his February 6, 2001, letter decision, he had initially found based on the record at that point that overnight visits would be appropriate (A426).

A201 to A203) and following the September 8, 2000, return date, Judge Harper continued the appointments of Ms. Scucci and Dr. Hagovsky and provided for further daytime parenting time for Mr. O'Callaghan pending further hearing on September 15, 2000 (A219 to A220). Following additional submissions by Mr. O'Callaghan (A221 to A243) and the conduct of the September 15th hearing, Mr. O'Callaghan unsuccessfully sought an emergent order seeking recusal of Judge Harper and custody of D.T.B. (A263 to A264).[3]

By order entered October 27, 2000, Judge Harper memorialized his findings and rulings as to the September 15, 2000, hearing and thereby directed that the appointment of the guardian ad litem would continue and that if the parties could agree, a psychologist participating in V.J.B.'s insurance plan could be substituted for Dr. Hagovsky. (A269 to A271).

In response to an emergent Order to Show Cause filed by Mr. O'Callaghan, the court subsequently directed in October and November, 2000, orders that, pending the reports of the guardian ad litem and psychologist, overnight visits by D.T.B. with Mr. O'Callaghan would not proceed, but that Saturday visits between 10:00 a.m. and 6:00 p.m. would continue (A270; A274; A277). Judge Harper further directed the court-appointed psychologist to conduct "evaluations of both parties and the child, addressing parenting time of the child with [Mr. O'Callaghan], including overnights, as well as potential parental alienation[;]" (A278).

In his November 15th order Judge Harper explained:

> 3. Pending further Order of the Court, and receipt of reports from both the Court appointed *guardian ad*

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[3] In October, 2000, petitioner unsuccessfully moved for emergent relief before the Superior Court of New Jersey, Appellate Division asserting "clear error and violation of the Constitutional safeguards as to orders entered in August and October, 2000" (A266 to A268).

> *litem* and psychologist, overnight visitation of Plaintiff with the minor child will not occur. There is much high conflict between these parties which has so seriously impacted the child as discussed in the certifications filed by the parties and others, and these parties are so litigious and apparently incapable of recognizing what is in the best interests of their son without the intervention of a *guardian ad litem* and psychologist that it is necessary to appoint a *guardian ad litem* and a psychologist to bring this matter to an appropriate resolution.
>
> 4. Unfortunately, the Court's effort to bring such assistance to the parties is misperceived by the Plaintiff as an effort toward delay and not recognized as needed under the circumstances. Limited visitation will continue until the Court receives an impartial assessment and an accurate account of what is in the child's best interest. There is no irreparable harm as Plaintiff claims.
> [A277; emphasis added].

Following a rescheduling of the November 17, 2000, hearing for December 8 due to a second motion filed by Ms. B. which was not properly served (A278; A281) and Mr. O'Callaghan's application for reconsideration of the adjournment, Judge Harper issued findings of fact and conclusions, reiterating that the suspension of overnight visitation continued "because of conflicts between the parties and the impact same is having upon the child as evidenced by certifications filed with the court . . ." (A280). The court further opined as to Mr. O'Callaghan's application for recusal of the judge that:

> This is a 'high conflict case' which now threatens, if not properly managed, to engulf defendant's counsel and the Court in efforts to divert attention from the best interests of D[ ] to plaintiff's claims of

> prejudicial and unfair treatment by those who disagree with him. His efforts to have this Court recuse itself are obviously designed to seek another judge who will make rulings more favorable to plaintiff's position. As discussed below there is no basis for recusal and this Court will not reward the plaintiff's efforts to forum shop. Plaintiff must cooperate with the guardian ad litem and the psychologist, continue with his visitation as ordered and reduce the level of conflict. To do otherwise, is not in the best interests of D[ ].
> [Ibid.].[4]

Following further submissions by Mr. O'Callaghan as to the application for recusal (A282 to A292; A293 to A294), the submission of a preliminary report of the guardian ad litem following a visit with D.T.B. at his mother's home (A296 to A298), and a hearing conducted on December 8, 2000, Judge Harper entered an order on December 13, 2000, denying the motion for recusal, granting the motion to find Ms. B. in violation of litigant's rights and further ordering additional visits between D.T.B. and Mr. O'Callaghan in New York and New Jersey (A235). The court further directed that the parties "cooperate with the guardian ad litem and court-appointed psychologist to allow expeditious completion of their reports" (A336).[5] In the accompanying findings of fact, the court reiterated its view that the appointments of the guardian ad litem and psychologist were

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[4] The Appellate Division subsequently denied Mr. O'Callaghan's motion for leave to appeal and stay this order (A295).

[5] In her initial report, Scucci had indicated that she had been unsuccessful in her attempts to communicate with Mr. O'Callaghan to arrange for a visit at his home with D.T.B. (A297). By letter dated December 13, 2000, Judge Harper requested that Scucci contact Mr. O'Callaghan again and directed Mr. O'Callaghan to communicate with her (A331).

necessary to help the court determine D.T.B.'s best interests given the "high degree of conflict" between the parents (A237 to A238).

Following the filing of an Order to Show Cause by Mr. O'Callaghan on December 16, 2000, asserting violation of his constitutional rights by entry of the court's orders, as well as additional submissions (A344 to A364; A365 to A374; A375; A379 to A380; A381 to A388; A389 to A394), Mr. O'Callaghan sought, inter alia, recusal of Judge Harper, disqualification of V.J.B.'s counsel, the guardian ad litem and Dr. Hagovsky, immediate institution of overnight visitation, and vacating of all prior orders, (A389 to A394; A397 to A399). Subsequent to a February 2, 2001, hearing before Judge Harper, the court denied the motions for reconsideration and disqualification and further ordered Mr. O'Callaghan's payment of V.J.B.'s counsel fees (A421 to A42). Directing that the complaint for custody and/or visitation be dismissed, the court further ordered that Mr. O'Callaghan's daytime Saturday visits continue and that Ms. Scucci and Dr. Hagovsky were relieved of their duties with any continuing efforts to be on a voluntary basis. (A421 to A422). In an accompanying letter decision dated February 6, 2001, the court addressed each of the issues addressed in Mr. O'Callaghan's submissions, noting:

> This Court is satisfied from the plaintiff's conduct and the defendant's certifications that at no time did Mr. O'Callaghan cooperate with this Court's efforts to have the Guardian ad Litem discharge her duties, and further, to have a Psychologist assess the parenting abilities of the parties and provide an evaluation. The plaintiff has some mistaken notion that the Court should enforce its own orders sua sponte. The Court has responded appropriately in this case to the requests of the parties for its intervention. The Court appointed qualified professionals to assist it in fact-finding only to have

> its efforts constantly frustrated by the plaintiff who sought to challenge the appropriateness of the appointments and who resisted cooperating. Incredibly, plaintiff now claims that it was the Court who failed to see to it that the professionals had completed their assignments in a timely fashion. The plaintiff apparently fails to comprehend the inconsistency of his position and seeks only to blame the Court instead of himself for the failure of the professionals to complete their assignments. It is evident that Mr. O'Callaghan is seeking to delay and frustrate the Court's efforts to gather facts about this matter through legal maneuvering and challenges. There is no other reasonable or appropriate explanation.
> [A427; emphasis supplied].[6]

Mr. O'Callaghan thereupon filed a motion for leave to appeal with the Appellate Division on February 16, 2001 (A440 to A441). By order of the Appellate Division entered on April 16, 2001 (A464), the court determined that the challenged February 6, 2001, order was a final order, appealable as of right. Mr. O'Callaghan was thus directed to file a Notice of Appeal, which he did on or about April 19, 2001, challenging both the February 6 and March 26, 2001, orders entered by Judge Harper. (A471). Mr. O'Callaghan subsequently filed a separate appeal as to the June 28, 2001,

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[6] Judge Harper subsequently adjudicated additional motions presented by Mr. O'Callaghan (A442 to A455) with regard to his child support obligations and payment of counsel fees by order entered March 26, 2001 (A456; A457 to A458). Cross-motions by the parents were also addressed by Judge Harper in an order entered on June 28, 2001. See Appendix B to the State Respondents' Brief Opposing Certiorari (hereinafter RApp.B at 57a to 59a).

order, which later was consolidated with the earlier appeal (RApp.B at 63a to 64a).[7]

By unpublished opinion issued on October 29, 2002, the Appellate Division affirmed the Family Part orders entered on February 6, March 26, and June 28, 2001, "substantially for the reasons articulated by Judge Harper in his comprehensive written opinions accompanying each order." (RApp.B at 65a).[8] The court also specifically found that "[t]he case management efforts undertaken by Judge Harper were designed to provide the court with sufficient information to evaluate plaintiff's claim for custody, and to determine a custodial and parenting-time arrangement that met the best interest of D[ ]. Plaintiff's efforts frustrated that effort and resulted in the court's dismissal of plaintiff's claim." Id. at 68a to 69a. Nevertheless, the Appellate Division directed that a remand hearing be conducted by the Family Part as to the "issue of whether overnight parenting-time sessions between D[ ] and his father are in D[ ]'s best interest and, if so, the nature and frequency of same." Id. at 69a. The appellate panel further noted "that the overnight parenting-time issue should be expeditiously managed and adjudicated through imposition of tight time frames. Although full cooperation by

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[7] In a brief filed with the Appellate Division in February, 2002, challenging each of Judge Harper's orders, Mr. O'Callaghan asserted that the Family Court's "unfair extinguishment of 'overnight' visitation not only has been injurious to the minor child (and . . . his father but also has violated procedural rules and compelling New Jersey case law and has been accomplished in violation of constitutional safeguards. See generally, Ankenbrandt v. Richards, 504 U.S. 689 (1992). See Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); Shapiro v. Thompson, 394 U.S. 618 (1969)" (Plaintiff's pro se Brief, Docket No. 006659-00T3 at p.7).

[8] A redacted copy of this opinion as well as of the ensuing July 20, 2003, Appellate Division opinion as to D.T.B. have been included in the State respondents' appendix as references to the minor and his mother in this federal litigation have been by initials only.

both parties obviously serves the interest of their own respective positions, evaluations necessary to determine this issue can be accomplished with or without parental cooperation." Id. at 70a. No further appeal to the Supreme Court of New Jersey, as permitted by N.J. Ct. R. 2:2-5(b), appears to have been filed.[9]

In the interim, one day after issuance of Judge Harper's February 6, 2001, order, Mr. O'Callaghan filed a complaint in the United States District Court for the District of New Jersey (A41) and on April 6, 2001, an amended complaint, then also on behalf of his son (A40 to A41; A52 to A110), naming Judge Harper and Attorney General Farmer, in their official capacities only, as well as the guardian ad litem, Ann T. Scucci, Dr. Hagovsky, and V.T.B.'s counsel David F.

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[9] Contrary to petitioners' claims (Pet. at 17) and as the cited rule makes clear, a judgment of the Appellate Division on appeal from "a final judgment shall be reviewable by the Supreme Court on certification or, when appropriate, as of right, notwithstanding the remand of the matter by the Appellate Division for further proceedings." Thus, Mr. O'Callaghan could have sought review of the October 29, 2002, appellate ruling.

In any event, following the Appellate Division's October 29, 2002, remand, proceedings continued before Family Part Judge David Rand. Following a hearing on July 2, 2002, the court entered an order providing, in pertinent part, for overnight visitation by Mr. O'Callaghan with D.T.B. from July 3 at 11:00 a.m. to July 7 at 12:00 p.m. and for vacation after July 20 (RApp.A at 12a). Following additional hearings, the court entered orders providing for further vacation/overnight visitation by Mr. O'Callaghan with D.T.B. (Id. at 13a to 15a). As revealed in the Appellate Division's July 1, 2003, opinion arising from this custody dispute, additional Family Court hearings regarding visitation schedules continued into 2003.(Id. at 16a).

Salvaggio as defendants.[10] By his amended complaint, Mr. O'Callaghan alleged violation of his and his son's federal rights of privacy, access to the courts, the privilege and immunities clause (Article IV §2, Clause 1) as well as the First, Fifth, Seventh, Ninth and Fourteenth Amendments arising from the June, 11, 2000, to March, 22, 2001, proceedings before Judge Harper (A52 to A91).[11] As the first

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[10] As asserted in the State's motion to dismiss, nowhere in the amended complaint is there any reference to any actions taken by Attorney General Farmer with regard to either Mr. O'Callaghan or D.T.B. in the proceedings initiated by Mr. O'Callaghan before Judge Harper. Nor is there any explanation for why this executive branch officer is referred to as a "Judicial Defendant" (A92) or has been sued with regard to the application of Court Rules promulgated by the Supreme Court of New Jersey.

[11] Following a detailed, thirty-one page recitation of the proceedings before the Family Court from commencement of the action on June 22, 2000, through the entry of the March 26, 2001, order (A55 to A86), paragraph 150 of the amended complaint summarizes the constitutional challenges asserted:

> In so acting, Judge Harper violated DTB's and Plaintiff *Pro Se*'s due process and equal protection rights, *i.e.*, planned and intended not an arbitrary misapplication of State law, but rather, a consistent avoidance and omission of enforcement of State statutory law and rules and customary Family Court practices and procedures so as to preclude to DTB and to Plaintiff *Pro Se* the rights to (i) parent-child relationship; (ii) association including companionship, society, affection and comfort between the minor child and natural father, (iii) the equal application of resources of the State Track System, and (iv) Plaintiff *Pro Se*'s ability to have commenced-and pursued - - the claims, *i.e.*, effective visitation and custody.
> [A87; emphasis in original].

(continued...)

and second claim for relief, Mr. O'Callaghan sought a declaratory judgment that Judge Harper and Attorney General Farmer's actions violated federal constitutional rights "as identified in the aforesaid facts and circumstances alleged" as "relating to the identified hearings and Family Court orders and Findings and the Letter Decision and the $10,000 Order and related practices/procedures conducted pursuant to the above Rules and in consequence of the conduct of the Judicial Defendants . . ." (A94) and that N.J. Ct. R.5:8B (Appointment of guardian ad litem), N.J. Ct. R.5.1 (Case management Track Rules), N.J. Ct. R.5:3-3 (Appointment of Experts) and N.J. Ct. R.5:8-1 (custody of children) were unequally applied to unmarried fathers or were otherwise vague and unconstitutional (A92 to A94; A100).

Asserting a "biased Family Court judge, unconstitutional Family Court practices/procedures and statutes" (A94) as well as discriminatory treatment (A96), Mr. O'Callaghan also sought in the third and final, fourth claim for relief as to the State respondents an order:

> (i) enjoining enforcement of all orders, findings, decisions, and judgments, including the Letter Decision and the $10,000 Order, issued in the Family Court case;
>
> (ii) directing reinstatement of the Plaintiff *Pro Se's* Family Court complaint including claims for effective visitation and custody;
>
> (iii) directing a fair and impartial Visitation Rights Hearing and

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[11](...continued)
See also A88 to A91.

custody trial in compliance with the State's Track System with implemented constitutional safeguards which include enjoining as "volunteers" Scucci and Hagovsky;

(iv) directing transfer of the case to a fair and impartial Family Court judicial official and the imposition of reasonable right of access to courts standards;

(v) directing that the all proceedings and the record in the Family Court case commenced upon parentage be made confidential and sealed pursuant to Ch. 9:17-42 and R.5:3 in the best interests of the minor child grounded upon the First Amendment and Right to Privacy.

[A95 to A96].

See also A97.[12]

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[12] Four additional complaints were subsequently filed by Mr. O'Callaghan with regard to the preceedings as to D.T.B:

1. A suit later consolidated with the amended complaint filed against Attorney General Farmer and Judge Harper, naming Ms. Scucci, Mr. Hagovsky and Mr. Salvaggio as defendants (C.A. No. 01-4032) (A496 to A516);

2. A complaint naming, among others, then Attorney General Samson, Judge Harper, and Judge David B. Rand, who handled subsequent proceedings in the D.T.B. custody litigation, as defendants (C.A. No. 2002-CV-5791;

(continued...)

On March 19, 2001, the New Jersey Attorney General moved, pursuant to Fed.R.Civ.Proc. 12(b)(1) and (6), to dismiss the complaint filed against Judge Harper and Attorney General Farmer (A48 to A51) on the grounds of lack of subject matter jurisdiction by reason of the Rooker-Feldman doctrine and also urged that the District Court should abstain on Younger v. Harris, Pullman and/or Burford abstention grounds. (App. A at 1-2; 7-8).[13]

In an opinion dated August 9, 2001, the District Court determined that it lacked subject matter jurisdiction to hear the case under the Rooker-Feldman doctrine as the federal court challenge was essentially an attempt "to seek federal court review of the Family Court decision" which appeal was already pending before the Superior Court of New Jersey, Appellate Division (App.A at 13). As noted by the court, "district courts must evaluate whether the relief requested by the complainant would void the state court's rulings. Accordingly, a complaint which essentially appeals a final state court decision must be dismissed for lack of subject

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[12](...continued)

3. A complaint naming as defendants, among others, the Advisory Committee on Judicial Conduct with whom Mr. O'Callaghan filed a complaint as to Judge Harper (C.A. No. 2002-CV-5791); and

4 A complaint naming Attorney General Harvey, Appellate Division Judge Rodriguez, Judge Rand, among others, as defendants (C.A. No. 2003-CV-4419).

Only the last filed action remains pending.

[13] The motion further urged dismissal of the complaint as to Attorney General Farmer as the complaint failed to state a claim against him upon which relief could be granted and further argued that the complaint should be dismissed for failure to demonstrate entitlement to injunctive relief.

matter jurisdiction." (Id. at 9-10). The court thereupon concluded that to grant injunctive relief in this case based "on the multitude of . . . constitutional rights [allegedly] violated by Judge Harper in his family court proceedings" would effectively reverse the state court judgment, contrary to Rooker-Feldman. (Id.at 10-11).

As to the remaining claims asserting that New Jersey Court Rules 5:1-4, 5:3-3 and 5:8-1 were unconstitutional, the court noted its need to assess, under District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983), whether these claims "were inextricably intertwined ith the state court's [decision] in a judicial proceeding", thus requiring the court "in essence being called upon to review the State court decision". (Id. at 8). While recognizing that Mr. O'Callaghan purported to assert a facial challenge to these court rules, the district court found significant that the injunctive relief requested were the court to find any of the three rules unconstitutional was limited to "enjoin[ing] enforcement of all orders, findings, decisions, and judgments, including the letter decision and the ten-thousand ($10,000) order, issued in the Family Court case." (Id. at 12). Accordingly, the court construed the facial constitutional challenges as "nothing more than an attempt to have this Court reverse a state court decision." (Id. at 12-13). Thus, by order entered that same day, the court dismissed the complaint with prejudice as to Judge Harper and Attorney General Farmer (App. B). By Amended Order dated December 17, 2001, the court clarified that its earlier order contemplated dismissal of the claims set forth in the Amended Complaint (App. C).[14]

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[14] By order dated September 26, 2003, the District Court also dismissed the complaint as to Dr. Hagovsky on Rooker-Feldman grounds as well as based on its finding that as a court-appointed psychologist Dr. Hagovsky was absolutely immune from liability (App. D). On appeal, the United States Court of Appeals for the Third Circuit affirmed the District

(continued...)

By per curiam opinion issued on September 14, 2004, the United States Court of Appeals for the Third Circuit affirmed the District Court's conclusions as to the applicability of the Rooker-Feldman doctrine, noting:

> We appreciate the importance of O'Callaghan's concerns, but the claims asserted in the present federal action are inextricably interwined with the state court decisions, and the lower federal courts accordingly lack jurisdiction to entertain those claims.
> [App. E at 22].

By order entered on October 20, 2004, the Court of Appeals denied the petition for rehearing (App. G).

This petition for certiorari followed.

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[14](...continued)
Court's grant of summary judgment in favor of Dr. Hagovsky on the grounds of absolute immunity (App. E).

## ARGUMENT

### POINT I

**THE WRIT SHOULD BE DENIED AS THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE ROOKER-FELDMAN DOCTRINE TO PETITIONERS' FEDERAL SUIT SEEKING TO OVERTURN THE FINAL STATE COURT RULINGS ENTERED BY RESPONDENT JUDGE HARPER.**

In Rooker-Feldman Trust Co., 263 U.S. 413 (1923), the Court established that an unsuccessful state court litigant is barred by federal statutory law from challenging the correctness of a state court judgment on federal constitutional grounds in the district court. "To do so would be an exercise of appellate jurisdiction," which only the Supreme Court of the United States may exercise. Id. at 416.

Again, in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and this Term, in Exxon Mobil Corporation v. Saudi Basic Industries Corp.,544 U.S. ____, 125 S.Ct. 1517 (2005), the Court reaffirmed that federal court review of a state court judgment may not be obtained in the lower federal courts. As the Exxon Mobil Court emphasized, the Rooker-Feldman doctrine "is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." 125 S.Ct. at 1521-22.

This is precisely the case presented here. Thus, one day after Judge Harper issued his February 6, 2001, order dismissing Mr. O'Callaghan's complaint for custody and denying his motion for reconsideration as to his parenting-

time schedule, Mr. O'Callaghan filed his initial complaint in the federal district court challenging, as violative of his and his son's constitutional rights, rulings entered by Judge Harper over the course of the then eight-month Family Court proceedings. In addition to seeking a declaratory judgment finding Judge Harper's rulings to have violated numerous constitutional rights, Mr. O'Callaghan sought injunctive relief barring enforcement of all orders, findings and judgments issued by the Family Court, as well as reinstatment of the Family Court complaint and a direction for a further hearing as to the visitation issues before a different Family Part judge (App.A. at 7).

Plainly, each of the elements described in Exxon Mobil's clarification of the Rooker-Feldman doctrine were satisfied: the loser in the concluded State court proceedings complains of injuries caused by the State court ruling, preceding the federal filing, and "invit[es] district court review and rejection of these judgments." 125 S.Ct. at 1522.[15] As in Rooker, Mr. O'Callaghan "repaired to federal court to undo

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[15] Contrary to petitioner's contentions (Pet. at 15), the February 6, 2001, order entered by Judge Harper (as well as the subsequent March 26, 2001 and June 28, 2001 orders) were viewed by the Appellate Division as final orders, resulting in the court's issuance of the October 29, 2002, opinion addressing the merits of Judge Harper's various rulings (R.App.B). Moreover, insofar as the court in the October 29, 2002, opinion determined a need for further hearings before the Family Court on the visitation issue, the court's remand, by operation of N.J. Ct. R.2:2-5(b), did not render either the appellate ruling or the trial court rulings challenged interlocutory. As N.J. Ct. R.2:2-5(b) recognizes, an appeal may be taken to the Supreme Court of New Jersey from an Appellate Division order for remand so long as the original trial court rulings challenged were final.

the [State court] judgment . . .", 125 S.Ct. at 1527, and declare it "null and void." Rooker, supra, 263 U.S. at 414.[16]

And consistent with the Court's teachings in District of Columbia Court of Appeals v. Feldman, supra, 460 U.S. at 487 n.18, the lower courts upon a "close reading" of the amended complaint properly focused on the ultimate injunctive relief requested in determining that the essential relief sought from the district court was to review and overturn the rulings embodied in Judge Harper's February 6, 2001 order. See e.g., Stern v. Nix, 840 F.2d 208 (3d Cir.), cert. denied, 488 U.S. 826 (1980). As the courts below properly concluded, the amended complaint's assertions as to the invalidity of certain New Jersey court rules allegedly violated in the context of the Family Court proceedings before Judge Harper were "inextricably intertwined" with the challenges to the February 6, 2001, rulings. Id. at 486. Moreover, as made clear by the ultimate injunctive relief

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[16] In contrast, in Exxon Mobil, the federal plaintiff did not commence its action seeking to annul a state court judgment. Rather, as detailed by the Court, the federal action was filed by Exxon Mobil as a pre-emptive action prior to any state court adjudication, 125 S.Ct. at 1525.

Since Exxon's federal court challenge sought a determination as to whether Saudi Basic Industries Corporation had overcharged Exxon Mobil's joint ventures for sublicenses, rather than seeking to overturn an existing state court judgment, the later adjudication of the state suit did not, as the Court of Appeals concluded, deprive the lower federal courts of jurisdiction. While the existence of the state court judgment might warrant dismissal in whole or part of the federal case on claim or issue preclusion grounds or deferral to the state proceedings on Younger v. Harris, 401 U.S. 37 (1971) or other abstention grounds, "neither Rooker nor Feldman supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains sub judice in a federal court." Exxon Mobil, supra, 125 S.Ct. at 1527.

requested (no less than the essential focus of and the parties named in the amended complaint), the objective of the federal suit was to overturn and render null and void the findings and orders entered by Judge Harper as of February 6, 2001. As such, the courts below properly concluded that the relief requested as to the State respondents would run afoul of the Rooker-Feldman doctrine.

As the rulings below are consistent with the teachings of this Court as to the limited scope of the Rooker-Feldman doctrine and as no conflict or other compelling reason warrants review of this matter, certiorari should be denied.

## POINT II

### PURSUANT TO THE ELEVENTH AMENDMENT, THE FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION TO ADJUDICATE THE CLAIMS FOR RETROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF AS TO THE STATE RESPONDENTS.[17]

The Eleventh Amendment of the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.

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[17] Although the Eleventh Amendment argument was not raised or addressed below, this Court has repeatedly emphasized its obligation to examine its jurisdiction as well as the jurisdiction of the courts below. Edelman v. Jordan, 415 U.S. 651, 677-78 (1974).

This amendment gives "affirmation to traditional notions of state sovereign immunity and also bars actions by private citizens against not only the State but also state agencies, regardless of the relief sought." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984). The law is clear that unless a State has consented to such litigation or Congress has expressly abrogated the State's Eleventh Amendment immunity, claims brought in federal court against a State or its agencies by private citizens are barred by the Eleventh Amendment. Papasan v. Allain, 478 U.S. 265, 276 (1986); Pennhurst, supra, 465 U.S. at 100. "This bar exists whether the relief sought is legal or equitable." Papasan, supra, 478 U.S. at 276. In addition, this Court has consistently held that, under the Eleventh Amendment, suits against state officials in their official capacities are no different than suits against the State itself, and are barred. Hafer v. Melo, 502 U.S. 21 (1991); Will v. Michigan Dept. of State Police, 491 U.S. 58, 66, 71 (1989); Kentucky v. Graham, 473 U.S. 159, 165-166 (1985).

In the present case, Mr. O'Callaghan has sued, in their official capacities only, Judge Harper, who presided over the challenged Family Part proceedings from June, 2000, through March, 2001, as well as former Attorney General Farmer, who had no role in these proceedings Because the State of New Jersey has not consented to lawsuits against its judiciary and executive branch members, and because Congress has not abrogated the States' Eleventh Amendment immunity in civil rights suits such as this, the Eleventh Amendment bars the claims asserted as to Judge Harper and Attorney General Farmer in their official capacities. Therefore, the Court lacks jurisdiction under the Eleventh Amendment to review this matter.

The fact that the petitioners are seeking only declaratory and injunctive relief as to the State respondents does not deprive these state officials of the benefit of Eleventh Amendment immunity. As the Court has emphasized, the Ex

Parte Young, 209 U.S. 123 (1908), fiction only applies where the requested relief is prospective, and not retrospective, in nature. Idaho v. Couer d'Alene Tribe of Idaho, 521 U.S. 261, 294 (1997). See also Verizon Md. Inc. v. Public Service Comm'n of Md., 535 U.S. 635, 645-48 (2002).

In the present case, petitioners are seeking retrospective relief in the form of a declaration that their constitutional rights were violated in the past by the rulings of Judge Harper. This is retrospective relief for an alleged wrong by a public official rather than prospective relief against state officials. See Green v. Mansour, 474 U.S. 64, 68 (1985). Additionally, insofar as Attorney General Farmer played no role in the challenged Family Court proceedings nor in the adoption or enforcement of the challenged court rules, the limited exception carved out by Ex Parte Young does not apply and Eleventh Amendment immunity obtains for this reason as well. See Fitts v. McGee, 172 U.S. 516, 529-30 (1899). Compare with Ex parte Young, supra, 209 U.S. at 156. See also Okpalobi v. Foster, 244 F.3d 405, 412-419 (5th Cir. 2001).

Accordingly, the claims for declaratory and injunctive relief brought as to the State respondents are barred under the Eleventh Amendment. Therefore, the petition for certiorari should be denied on this basis alone.

## POINT III

### DISMISSAL OF THE FEDERAL COMPLAINT SEEKING INJUNCTIVE AND DECLARATORY RELIEF AS TO JUDGE HARPER AND ATTORNEY GENERAL FARMER WOULD HAVE BEEN WARRANTED, AS ARGUED BELOW, UNDER YOUNGER V. HARRIS, 401 U.S. 37 (1971), ABSTENTION PRINCIPLES.[18]

In its long line of abstention decisions beginning with Younger v. Harris, 401 U.S. 37 (1971), this Court has articulated a strong public policy against interference with ongoing state proceedings by federal courts. The Younger Court identified two primary reasons for federal courts to abstain where there are pending State proceedings. One is the basic equitable principle that courts of equity should not act, particularly to restrain State judicial processes, when the affected party has an adequate remedy at law and will not suffer irreparable harm by denial of the equitable relief. Id. at 45. The second, more critical consideration, is the notion of federalism or comity. As further developed in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and Pennzoil v. Texaco, 481 U.S. 1 (1987), the Younger abstention doctrine instructs that absent extraordinary circumstances justifying intrusion, federal courts should refrain from taking any action in cases where the federal plaintiff has adequate redress available in State court proceedings.

Although Younger involved State court criminal proceedings and a request for federal injunctive relief, the Court has extended the doctrine to the civil context (where

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[18] This Court can dispose of the petition for certiorari on any ground raised below and therefore is not limited to the single rationale for dismissal of the claims upheld by the lower courts. See Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984).

both federal injunctive and declaratory relief are sought) when the following three requirements are satisfied: (1) there is an ongoing state proceeding which is judicial in nature; (2) the proceeding implicates important state interests; and (3) there will be an opportunity at same stage of the proceeding to raise constitutional challenges. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). See also Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

In Huffman v. Pursue, Ltd, supra the federal plaintiff had never appealed from the grant of a permanent injunction against him in the Allen County Court of Common Pleas. As detailed by the Court:

> As a matter of state procedure, the judgment presumably became final, in the sense of being nonappealable, at some point after the District Court filing, ... [But] regardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of Younger is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in Younger.
> [Id. at 608; emphasis added]

The Huffman Court expressed the important interests that are served by this deference to the state appellate process

> Virtually all of the evils at which Younger is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state

> appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a nisi prius determination that its valid policies are being violated in a fashion which justifies judicial abatement.
> [Id. at 608-09; emphasis added]

For these reasons the Court concluded that it did not matter for Younger purposes whether the federal plaintiff had availed himself of the state appellate option: "In any event, [the plaintiff] may not avoid the standards of Younger by simply failing to comply with the procedures of perfecting its appeal." Id. at 611 n. 22.

More recently in New Orleans Public Service v. New Orleans, 491 U.S. 350, 368-369 (1989), the Court again voiced similar sentiments:

> For Younger purposes, the State's trial-and appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign. For the same reason, a party may not procure federal intervention by terminating the state judicial process prematurely ...
> [emphasis supplied]

In this case, the District Court properly could have dismissed the claims asserted as to the State respondents under Younger abstention principles. As this Court in Huffman recognized, Younger abstention principles seek to avoid "federal intervention which would annul the results of [a State court or] agency determination," and deprive the States of the legitimate and proper function of resolving

constitutional issues "in litigation over which they had jurisdiction." 420 U.S. at 609. This point was earlier highlighted in Wooley v. Maynard, 430 U.S. 705, 711 (1977). There, in declining to find error in the District Court's refusal to abstain, the Court noted:

> Here ... the suit is in no way 'designed to annul the results of a State trial' since the relief requested sought is wholly prospective, to preclude future prosecution under a statute alleged to violate appellees' constitutional rights. Maynard has already sustained convictions and has served a sentence of imprisonment for his prior offenses. He does not seek to have his record expunged, nor to annul any collateral effects those convictions may have, e.g. upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes.
> [emphasis supplied]

However, in this case, petitioners seek precisely the relief the Maynard Court sought to distinguish. Thus, the amended complaint requests a declaratory ruling as to the "unconstitutionality of the [New Jersey Court] Rules relating to the identified hearings and Family Court orders and Findings and the [February 6, 2001] Letter Decision and the $10,000 Order and related practices/procedures conducted pursuant to the above Rules . . ." (A94). As well, petitioners seek an order "enjoining enforcement" of all of Judge Harper's orders issued in the Family Court case as well as reinstatement of the June, 2000 complaint for "effective visitation and custody". (A95; A97; A101).

Clearly such claims for relief, insofar as it would render the final determinations of the Family Court a nullity, fall directly within the Wooley v. Maynard proscription and thus should not be properly entertained by the federal courts. See Pennzoil Co. v. Texaco, Inc., supra, 481 U.S. at 13-14

(federal action to enjoin enforcement of State court judgment and to declare Texas bond and lien provisions violative of due process by arbitrarily depriving Texaco of right to appeal dismissed on Younger abstention grounds to avoid federal granting of relief which would make State court's judgments "nugatory").

Moreover, in the present case, as in Pennzoil, all three preconditions for Younger abstention were satisfied. Within two weeks of the date the amended complaint was filed in federal court, Mr. O'Callaghan had filed his first appeal as of right in the State appellate court from Judge Harper's February 6 and March 26, 2001 orders - - the very orders challenged in this action. Thus, there is no question as to the existence of an on-going proceeding in State court with respect to the custody case that forms the basis of the constitutional claims before the federal court. This satisfies the first of the Younger abstention requirements.

Nor can there be any doubt as to satisfaction of the second Younger factor - - that the pending state proceeding implicated important state interests. The federal courts have repeatedly recognized that child custody issues reflect important state interests and that state courts have an important interest in matters involving divorce, alimony, child custody and spousal and child support. See Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301, 2309 (2004); Moore v. Sims, 442 U.S. 415, 434-35

(1979).[19] Accordingly, the second Younger requirement was satisfied.

Finally, the state appeal process which Mr. O'Callaghan pursued afforded the opportunity to raise (as he had below) his federal constitutional claims. Under the New Jersey Court Rules, litigants who disagree with the findings of a trial court have a right to appeal that decision to the Appellate Division of the state and further to the New Jersey Supreme Court if the Appellate Division decision is not acceptable. Moreover, it is clear that the state appellate proceedings offer ample opportunity to present constitutional claims. Thus, the Supreme Court of New Jersey in Maisonet v. Dept. of Human Services, 140 N.J. 214, 657 A.2d 1209 (1995), ruled that in an appeal from a State administrative decision the appellant could include claims under 42 U.S.C. §§1983 and 1988 directly related to the challenge to the agency action. Thereafter, the Appellate Division could either decide the federal claims in the exercise of its original jurisdiction or transfer those claims to the Law Division. 140 N.J. at 226-227. No lesser ability obtained as to the appeal from the Family Court orders. Thus, as is evident in Mr. O'Callaghan's Appellate Division appeal brief, he was free to raise anew both state law and federal constitutional challenges to the rulings rendered by Judge Harper.[20]

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[19] Indeed, given the preeminent role of the State courts and federal court deference to State law in this area it might have been appropriate for the district court to have declined jurisdiction under the "domestic relations exception" even though the relief requested did not seek issuance directly by the federal court of a child custody decree. See Ankenbrandt v. Richards, 504 U.S. 689, 703, 705-6 (1992) But see Elk Grove Unified School District v. Newdow, supra, 124 S.Ct. at 2313-14 (concurring opinion of Chief Justice Rehnquist).

[20] Here, review by the state appellate courts eliminated many of the state law issues undergirding the constitutional claims, which

(continued...)

Because all of the requirements needed for application of the Younger abstention were present in this case, and as no compelling equitable basis for federal court intervention was presented, the courts below appropriately should have abstained from hearing this matter. Thus denial of the petition for certiorari is warranted on this basis as well.

## POINT IV

## THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF AS TO THE STATE RESPONDENTS ARE MOOT.

Insofar as the essential relief sought by the amended complaint filed in April, 2001, as to the State respondents was for an order directing reinstatement of Mr. O'Callaghan's Family Court complaint for effective visitation and custody of his son, and a hearing before a judge of the Family Part (other than Judge Harper) as to visitation rights, that relief was accorded by reason of the intervening Appellate Division ruling of October 29, 2002. Although the appellate panel rejected the multitude of arguments advanced by Mr. O'Callaghan as to the invalidity of Judge Harper's February, March and June, 2001, orders, the court did remand the case for further hearings as to the issue of overnight visitation between D.T.B. and his father (RApp.B at 69a to 70a). As revealed in the subsequent July 1, 2003, Appellate Division opinion, those hearings proceeded before the Family Part (and

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[20](...continued)
petitioners continue to advance before this Court, see Pet. at 2 and n.1, 7 n.5, 16,17,19,20,21,23 as to the Parentage Act, N.J.S.A. 9:17-38 et seq, application of N.J. Ct. R.5:1-4 and the family therapist privilege as explored in Kinsella v. Kinsella, 150 N.J. 276, 696 A.2d 556 (1997). See R.App.B at 65a to 69a.

before a judge other than Judge Harper) (RApp.A at 7a to 15a). Additionally, Mr. O'Callaghan had the opportunity in his state appeal to present his claims as to the unconstitutional application of the court rules challenged in this litigation and the further opportunity to seek review of those claims before the Supreme Court of New Jersey, and thereafter this Court. He, however, chose not to do so.

As the rulings by Judge Harper challenged in this litigation have been effectively resolved by the intervening Appellate Division ruling, no live controversy exists as to the essential relief sought in this litigation. See Arizonans for Official English v. Arizona, 520 U.S. 43, 67-68 and n.23 (1997). See also Green v. Mansour, supra, 474 U.S. at 72-73 (equitable considerations militate against issuance of declaratory relief where dispute concerns repealed law). For this reason as well, the petition for certiorari should be denied.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY
Attorney for State Respondents

By:_____
Andrea M. Silkowitz
Assistant Attorney General
Counsel of Record

R.J. Hughes Justice Complex
P.O. BOX 112
Trenton, New Jersey 08625
(973) 648-4730

Dated: May 18, 2005